

REMARKS

Applicant has added no new matter as defined within the scope of 35 USC 132.

1. Rejection of Claim 3 Under 35 USC Section 112, para. 6

The Examiner has rejected claim 3 under 35 USC 112, para. 6 as not meeting the requirements of the three-prong test for using means-plus-function claim construction. Applicant respectfully traverses the rejection and requests withdrawal thereof.

Section 112, para. 6 states:

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material or acts described in the specification and equivalents thereof.

The Examiner properly recites the three steps required in the analysis of claims that appear to invoke mean-plus-function language as permitted under Section 112, para. 6. The Examiner, however, has improperly applied this analysis to claim 3, wherein Applicant has deliberately avoided invocation of Sec. 112, para. 6. Claim 3 is directly dependent on claim 2, which claim reads as follows:

“An exercise apparatus according to claim 1, further including at least one clamping member along said body where each said intussusceptible portion accepts and adjacent intussusceptible portion therewithin, wherein said clamping member includes **means for frictional engagement of an adjacent intussusceptible portion.**”

Claim 2 properly employs the means-plus-function language permitted by Section 112, para. 6 and meets all three prongs of the test for analyzing such claims. The claim limitation uses the phrase “means for” and is modified by functional language without the recital of specific structure, material or acts for achieving the stated function. Claim 2 would therefore be properly considered to include the structure recited in the specification as means that accomplish the recited function and any equivalents thereof, whether or not so recited. Claim 3, which properly depends from claim 2, does not invoke

Section 112, para. 6 nor does the applicant intend such invocation. Applicant has properly written claim 3 to recite specific structure, and this claim language is permissible in view of current applicable statutes and case law. Applicant therefore respectfully requests that the rejection of claim 3 under Section 112(6) be withdrawn.

**2. Rejection of Claims 1 to 3, 5 and 6 for Lack of Novelty
 Under 35 USC Section 102(b)**

The Examiner has rejected claims 1 to 3, 5 and 6 under 35 USC 102(b) as being anticipated by US Patent No. 5,330,143 to Rich (“Rich”). Applicant respectfully traverses this rejection and requests withdrawal thereof.

Section 102(b) states:

A person shall be entitled to a patent unless the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

Applicant respectfully submits that Rich does not anticipate independent claim 1 and claims 2, 3, 5 and 6 depending either directly or indirectly therefrom. In particular, Rich does not disclose, either explicitly or implicitly, an exercise apparatus having intussusceptible portions that comprise a height adjustable body in combination with a support member having a truss member and a cross member having a limb support portion with curvature that supports a user’s limb thereon. Rich discloses a craft stand having lower and upper members 32 and 33, respectively, in telescoping relation relative to one another and relative to a base 3. Three legs 9, 10 and 11 are provided for support of the craft stand and a craft supported thereby. Legs 9 and 10 are welded to a bottom surface of base 3 and leg is secured in a leg receiving aperture 14. This structure does not comprise a truss, which by definition comprises a pre-built component that is designed to carry its own weight and added superimposed design loads. A truss often functions as a structural support member and employs one or more triangles in its construction, as is shown in the figures of the present application.

In addition, Rich discloses a cross arm 80 having a clamp assembly 90 mounted at ends 81 thereof. The clamp assemblies 90 are specifically constructed for retention and support of a hoop craft thereby. Nowhere does Rich disclose, either explicitly or implicitly, an elongate support member having a cross member with a limb support portion protruding from a top surface thereof. The Examiner states that “Rich also discloses a truss member for support of the device, and a non-rotatable cross member whereupon a limb could be supported”. This is not the standard for analyzing a claim under Section 102(b). The reference relied upon to reject a claim under Section 102(b) must anticipate every element of the claim, either explicitly or implicitly. Rich does not disclose any structure having curvature for support of a user’s limb thereon. Rich therefore does not anticipate independent claim 1 of the present invention and claims depending directly and indirectly therefrom.

3. Rejection of Claim 4 for Obviousness Under 35 USC 103(a)

The Examiner has rejected claim 4 under 35 USC 103(a) as being unpatentable over Rich in view of US Patent No. 2,864,577 to DuMais (“DuMais”). Applicant respectfully traverses this rejection and requests withdrawal thereof.

Section 103(a) states:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the difference between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

Applicant reiterates the argument above with respect to Rich and adds that Rich, either alone or in combination with DuMais, does not teach, disclose or suggest an exercise apparatus for kicking and stretching having intussusceptible portions in combination with a reciprocatingly slidable leg connector. DuMais teaches a foldable standard base structure for a projection screen. There is no motivation for a person of ordinary skill in the exercise arts to combine Rich and DuMais, as such combination would obviate the portable and simple assembly characteristics of the latter while

detracting from the craft support objectives of the former. A person of ordinary skill in the art would not look at either reference, either alone or in combination, as neither reference provides a light, transportable device that sufficiently supports a user's limbs and also permits both height and length adjustments for a variety of exercises. Thus, Rich and DuMais, either alone or in combination, fail to disclose, teach or suggest the present invention as claimed in claim 4.

4. Rejection of Claim 7 for Obviousness Under 35 USC 103(a)

The Examiner has rejected Claim, 7 as being unpatentable over Rich in view of US Patent No. 5,300,002 to Freye ("Freye"). Applicant reiterates the above arguments and adds that Freye does not teach a slidable limb portion in combination with an intussusceptible elongate body as provided by claim 7 of the present invention. Freye discloses a portable exercise device comprising a rigid pole having a knob handle at each extent thereof. One handle is fixed to the pole while the second handle is rotatable theraround. One or two friction sleeve handles are also provided that enable gripping of the apparatus.

The examiner cites column 6, lines 39 and 40 of Freye to support the conclusion that "It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the stand as taught by Rich with a sliding portion for limb placement as taught by Freye, since such a modification would provide the stand with a sliding, limb support portion for allowing the user to place their limb on any longitudinal point along the cross bar" (Office Action, page 5, para. 4, lines 4 to 8). The language cited by the Examiner comprises claim 2 of the Freye patent, which reads:

The exercise device of claim 1, further comprising a rotatable and slidable handle mounted on the pole.

Neither Rich nor Freye, alone or in combination, teaches, discloses or suggests the exercise apparatus of the present invention according to claim 7. There is no motivation to combine Rich, a stand for support large hoop crafts, with Freye, a simple pole that can be gripped by one or more handles. Handles by definition are intended for gripping with one or more digits, and nowhere does Freye teach, disclose or suggest that

any such handle have a curvature for support of a limb thereon. Freye is intended to be used on its own as a transportable hand-held exercise device that does not require any additional structural support to function as claimed. Combining the teachings of Freye with those of Rich would create a large, heavy structure that is difficult to assemble and transport and would be impossible to use for the display and support of crafts. Thus, Rich and Freye, either alone or in combination, do not render claim 7 of the present invention obvious in view thereof.

5. Rejection of Claims 8 and 9 for Obviousness Under Section 103(a)

The Examiner has rejected claims 8 and 9 as being unpatentable over Rich in view of US Patent No. 6,652,419 to Rota ("Rota"). Applicant reiterates the above arguments with respect to Rich and adds that a person of ordinary skill in the art would have no motivation to combine the teachings of Rich and Rota. Rota discloses an exercise system utilizing a telescopic bar 41 having its free extents inserted into metal cradles 43R and 43L. Cradles 43R and 43L are attached to a door frame 50 to support a freely movable bar 63 and a user thereof. Incorporation of the telescoping bar of Rota with the craft stand of Rich would teach away from Rich's requirement that the disclosed craft stand support and affix a large hoop craft thereon. It is undesirable to provide a telescoping cross bar on the craft stand of Rich, as such cross bar would deleteriously affect the securement of any hoop craft thereon. In addition, securement of the craft stand of Rich to the exercise device of Rota would inhibit the versatility sought by Rota for accommodating a variety of exercises. No one in the exercise arts would look at Rich in combination with Rota to teach the present invention as claimed in claims 8 and 9.

6. Rejection of Claim 10 for Obviousness Under Section 103(a)

The Examiner has rejected claim 10 of the present application as being unpatentable over Rich in view of US Patent No. 5,518,476 to McLeon ("McLeon"). Applicant repeats the arguments hereinabove and adds that McLeon teaches a podiatric exercise apparatus. There is no teaching in Rich for a truss-supported intussusceptible body in combination with a cross- bar having a limb receiving portion thereon. There is likewise no such teaching in McLeon. The indices taught by McLeon are specifically

applied to the podiatric function thereof and include the elevation of handrail assembly 42 and the rotation of rocker support member 24. Even if a person of ordinary skill in the art would use the indices taught by McLeon on the telescoping members taught by Rich, such person would have no motivation to do so to arrive at the present invention. Such a combination would produce a craft stand with indices thereon that still lacks the truss portion and limb receiving region taught by the present invention. Thus, Rich, either alone or in combination with McLeon, does not teach, disclose or suggest claim 10 of the present invention.

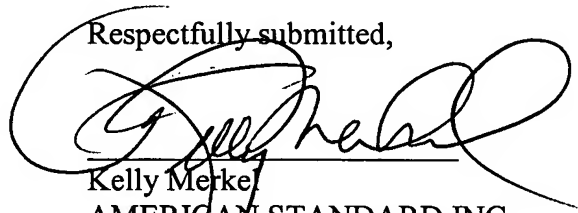
Applicant respectfully adds that, in the application of prior art under Sections 102 and 103, the Examiner should determine whether a preamble limits the examined claim. Statements in the preamble that recite the purpose or intended use of the claimed invention must be evaluated to determine whether the recited purpose or intended use results in a structural difference between the claimed invention and the prior art (see M.P.E.P. Sec. 2111.02, "Effect of preamble"). If a prior art structure is capable of performing the intended use as recited in the preamble, then it meets the claim (*In re Schreiber*, 128 F. 3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997)). The determination of whether preamble recitations are limitations or mere statements of purpose or use "can be resolved only on review of the entirety of the patent to gain an understanding of what the inventors actually invented and intended to encompass by the claim" (see *Chisum on Patents*, Volume 3, Sec. 8.06[1][d][i]. citing *Rowe v. Dror*, 112 F. 3d 473, 478, 42 USPQ2d 1550, 1553 (Fed. Cir. 1997)).

In this application, the term "exercise apparatus for kicking and stretching" is properly considered as breathing life and meaning into the claims "and, hence is a necessary limitation to them" (*In re Stencel*, 828 F. 2d 751, 4 USPQ2d 1071 (Fed. Cir. 1987)). Rich, which was relied upon in all claims rejections, neither teaches an exercise apparatus nor suggests that the apparatus may be used for kicking and stretching (and, in fact, lacks proper structure to accommodate limbs thereon to accomplish this purpose). Rich cannot therefore anticipate independent claim 1 and claims depending directly and indirectly therefrom. Also, Rich's omission of any explicit or implicit teaching with respect to an exercise apparatus cannot be cured by combination of Rich with any of the

aforementioned patents. Such combinations of prior art lack motivation to a person of ordinary skill in the art and therefore do not render any claims of the present invention obvious in view thereof.

Applicant respectfully submits that the present claims are in condition for allowance. Applicant invites the Examiner to contact Applicant's undersigned representative should the Examiner have any questions or require further information regarding this application.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Kelly Merke', is written over a horizontal line.

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ABSTRACT OF THE DISCLOSURE

INTUSSUSCEPTIBLE EXERCISE APPARATUS FOR STRETCHING AND KICKING

The present invention ~~is directed to~~ discloses an exercise apparatus for kicking and stretching. The apparatus includes an elongate support member having opposed upper and lower free extents with a longitudinal body interposed therebetween ~~and through which longitudinal axis passes~~. The body ~~comprises~~ includes one or more intussusceptible portions that are reciprocatingly slidable relative to one another and further relative to a lower body portion for height adjustment ~~of said apparatus~~. At least one clamping member is disposed along the body such that each intussusceptible portion accepts an adjacent intussusceptible portion therewithin. The support member also includes a truss member disposed proximate the lower free extent of the body and having two or more legs to stabilize the support member in an upright position ~~along the longitudinal axis~~. The legs are joined to a reciprocatingly slidable leg connector for retraction of the legs ~~toward the longitudinal axis~~. A cross member is ~~supported at the upper free extent of the support member and in normal relation therewith~~. ~~The cross member is disposed in generally a cantilever fashion so as to prevent rotation thereof, and~~ provided that includes a limb support portion for support of a user's limb thereon protruding from a top surface thereof. The apparatus ~~desirably includes one or more clamping members along the body where each intussusceptible portion accepts an adjacent intussusceptible portion therewithin.~~ ~~Each clamping member includes means for frictional engagement of an adjacent intussusceptible portion.~~